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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/715,324	11/17/2003	Peter John Hunt	1171/41475/56B/106/107	5106
279	7590	02/23/2005	EXAMINER	
TREXLER, BUSHNELL, GIANGIORGI, BLACKSTONE & MARR, LTD. 105 WEST ADAMS STREET SUITE 3600 CHICAGO, IL 60603			PAIK, SANG YEOP	
		ART UNIT		PAPER NUMBER
				3742
DATE MAILED: 02/23/2005				

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>
	10/715,324	HUNT ET AL.
	<b>Examiner</b>	<b>Art Unit</b>
	Sang Y Paik	3742

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) Responsive to communication(s) filed on \_\_\_\_.
- 2a) This action is FINAL.                    2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) Claim(s) 1-32 is/are pending in the application.
  - 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) Claim(s) \_\_\_\_ is/are allowed.
- 6) Claim(s) 1-32 is/are rejected.
- 7) Claim(s) \_\_\_\_ is/are objected to.
- 8) Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on \_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.
 

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
  - a) All    b) Some \* c) None of:
    1. Certified copies of the priority documents have been received.
    2. Certified copies of the priority documents have been received in Application No. 10/001,596.
    3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)                     |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)   | Paper No(s)/Mail Date. ____ .   |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date <u>3/22/04</u> . | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
|  | 6) <input type="checkbox"/> Other: ____ .                                   |

## DETAILED ACTION

1. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

2. Claims 1, 2, 8-13, 15, 17-20, 29, 30 and 32 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-3, 5-9, 11-17, 19, 21, 27 and 34-36 of copending Application No. 10/001,596. Although the conflicting claims are not identical, they are not patentably distinct from each other because the copending claims of the application '596 anticipate all the recited elements of the current application claims including the breathing apparatus assistance apparatus and method including the humidifier having the conduit heater, the ambient temperature sensor, the gas supply with the fan, a gas flow sensor, the water heater, and the controller which determines the parameters relating the gas flow and to monitor and control steps regulating the parameters to achieve the desired humidity level. In essence, once the applicant receives a patent for a more specific embodiment, the applicant is not entitled to a patent for the broader invention. This is because the more specific "anticipates" the broader.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

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3. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

4. Claims 15, 19 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

In claims 15 and 19, there is no proper antecedent basis for “said parameter”.

***Claim Rejections - 35 USC § 102***

5. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

6. Claims 1, 2, 16, 17, 18, 31 and 32 are rejected under 35 U.S.C. 102(b) as being anticipated by Daniell et al (US 5,558,084).

Daniell shows the breathing assistance apparatus having the humidifier with a controller (11, 16) to determine the parameter such as the temperature of the humidified gas and to determine and to supply the electrical power necessary for the heaters to heat the humidified gas at the desired level. The heaters include the conduit heater (10) and the water heater (20). Daniell further shows an ambient external temperature sensor (45), a humidification chamber (3) having the water heater (20) and a water heater sensor/chamber sensor (8) to monitor the parameter such as the temperature of the water heater, the controller which monitors or regulates the desired heating temperature with the input of the external temperature indicated by the external

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temperature sensor, a connector means (66) which enable to correctly connect the conduit heater to the controller, and an indicator (67, 620) which indicates proper functions of the apparatus.

***Claim Rejections - 35 USC § 103***

7. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

8. Claims 3-7, 13-15 and 19-23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Daniell et al (US 5,558,084).

Daniell shows the apparatus and method claimed except explicitly showing the controller to continuously monitor the claimed parameter and to follow the claimed steps.

Daniell teaches that the heating elements are controlled in response to the temperature sensors that measure the temperature of the water heater as well as the conduit heater and the ambient temperature. As the temperature falls or arises due to the surrounding conditions, the heaters are further controlled to be turned off or on.

While the Daniel does not shows explicitly show the sequence of the claimed steps, it would have been obvious to provide the controller with such monitoring processes or steps to monitor the changes in the threshold parameter values, including the changes in the temperatures, flow rate, or any other related parameters, so that the power to the water heater as well as the conduit heater can be continuously adjusted to maintain the desired humidity or gas temperature as the they are susceptible to the surrounding elements to affect its efficiency to meet the desired humidified gas.

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In claim 15, with respect to the recitation of the parameter being the power drawn by the water heater means divided by temperature of the water heater, it would have been obvious to one of ordinary skill in the art to use such parameter since the power and the temperature are proportionally related to each other that the claimed parameter would also be another form of the proportionally related value.

9. Claims 8, 9, 12, 24 and 25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Daniell et al (US 5,558,084) in view of McComb (US 5,349,946) or Clementi (US 5,031,612).

Daniell shows the apparatus and method claimed except the gas supply means to supply gas to the humidifier.

McComb shows a gas supply with a flow meter/sensor to supply gas and the processor to determine the desired humidity level at the given flow rate. Clementi also shows a gas supply such as a blower to provide the pressured gas flow to provide the desired humidified gas. In view of McComb or Clementi, it would have been obvious to one of ordinary skill in the art to adapt Daniell with the gas supply means to provide the air source that is humidified for the user and to control the rate at which the air/gas is provided.

10. Claims 10, 11 and 26-28 are rejected under 35 U.S.C. 103(a) as being unpatentable over Daniell in view of McComb or Clementi as applied to claims 8, 9, 12, 24 and 25 above, and further in view of Rapoport et al (US 5,546,933).

Daniell in view of McComb or Clementi, shows the apparatus and method claimed except the gas supply having a fan with the variable speed electric motor.

Rapoport shows a blower having a variable speed blower motor to supply air. In view of Rapoport, it would have been obvious to one of ordinary skill in the art to adapt Daniell, as

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modified by McComb or Clementi, with the variable speed motor fan to control the amount of gas and the rate at which the gas is supplied.

11. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Sang Y Paik whose telephone number is 571-272-4783. The examiner can normally be reached on M-F (9:00-4:00) First Friday Off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Robin Evans can be reached on 571-272-4777. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Sang Y Paik  
Primary Examiner  
Art Unit 3742



syp